Supreme Court, U.S.
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No. 96-1831

In The

Supreme Court of the United States

October Term, 1996

DALE ROBERTSON AND CHRISTINE ROBERTSON,

Petitioners,

vs.

THE CITY OF SOUTH GATE, CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, where the federal question does not meet this Court's test for ripeness? Is a Petition for Writ of Certiorari predicated on the takings clause of the Fifth Amendment ripe for review when the state courts have held that the petitioners failed to avail themselves of their opportunities to utilize the procedures prescribed by the state courts for obtaining compensation?

2. Should a Petition for Writ of Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, where petitioners are precluded from maintaining a claim for compensation under the Fifth Amendment's takings clause by governing principles of *res judicata*?

3. Should a Petition for Writ of Certiorari be granted to review an unpublished state court decision which may not be cited or relied upon as precedent by any court or litigant, to determine whether action enforcing a nuisance abatement resolution constituted a regulatory or physical taking, where under the circumstances the issue is purely a matter of state law, where such review would require examination and weighing of the evidence before the lower courts, and where petitioners voluntarily acquiesced in the lower court's granting of summary judgment on such claims?

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OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Second Appellate District, is set out verbatim in Appendix A to the Petition. By its terms, the Court of Appeal Opinion is not certified for publication in the Official Reports. Under Rules 976 and 977 of the California Rules of Court (set forth verbatim in Appendix I hereto), it may not be cited or relied upon by any court or any litigant in any other case, and thus has zero precedential importance.

JURISDICTION

There is no jurisdiction over the federal constitutional issues presented, because those issues are not ripe for adjudication under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402-1403 (9th Cir. 1989), *cert. den.*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). The California Courts below held that petitioners failed to pursue the available avenues of redress called for under California law for their "takings" claims. Petitioners having failed to avail themselves of their state compensation remedies, their federal constitutional claims are not ripe for adjudication and there is, accordingly, no jurisdiction to entertain the present petition.

STATUTES AND OTHER PROVISIONS INVOLVED

California Rules of Court, Rules 976 and 977, Appendix I hereto.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioners were the proprietors of a tire dealership in the City of South Gate. Pet.App.A, D; AA 1/192.[1] In September of 1990, a fire substantially damaged the business and the structure in which the business was housed, including the roof, garage doors, equipment and concrete block walls. Pet.App.A, D; AA 1/194.

Eleven months later, on August 26, 1991, the City Council of the City of South Gate duly passed, approved and adopted Resolution Number 5009, "DECLARING THE CONDITION OF THE PROPERTY LOCATED AT 5870 IMPERIAL HIGHWAY TO BE A PUBLIC NUISANCE AND ORDERING THE ABATEMENT THEREOF." Pet.App.D; AA 1/97-102.[2] As recited in Resolution 5009, it was adopted following a required public hearing and submission of testimony and evidence by petitioners and others. Pet.App.D; AA 1/97. The City Council rendered factual findings on the evidence presented (*Id.*), and rendered a decision embodied in the resolution. *Id.*

Neither petitioners nor any other person ever challenged Resolution 5009, or its findings, its conclusions, or the proceedings which led to its adoption, by a Petition for Writ of Administrative Mandamus pursuant to California Code of Civil Procedure Section 1094.5. As a result,

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[1] The abbreviation "AA" refers to Appellants' Appendix which, together with the Reporter's Transcript ("RT") constituted the record on appeal before the California Court of Appeal.

[2] Resolution 5009 is set out verbatim as Appendix D to the Petition herein, although it is erroneously titled "RESOLUTION NO. S009". Items included in the Appendix to the Petition are abbreviated herein as "Pet.App."

under governing principles of California law[3], the following facts were found by the City Council to exist *eleven months* after the fire, and were conclusively established in the courts below:

1. Petitioners' property at 5870 Imperial Highway in the City of South Gate is located at the intersection of Imperial Highway and Amery Way. The rear of petitioners' property fronts against a number of single-family residences. The property was improved with a commercial structure that sustained severe fire damage in September of 1990. One wall of the structure was destroyed, and two other walls were partially damaged. Pet.App.D; AA 1/98, ¶a.

2. Following the fire, City staff sent numerous letters to Mr. Robertson requiring that the structure on the property be repaired, restored or demolished. Staff scheduled meetings with Mr. Robertson to discuss the rebuilding of the property. No plans for the rebuilding of the property were submitted. Furthermore, Mr. Robertson refused staff's requests to inspect the property. Pet.App.D; AA 1/98, ¶b.

3. Staff obtained an inspection warrant to allow entry onto the property. The inspection demonstrated that the structure's roof had been totally demolished, leaving the sixteen foot high masonry walls of the structure without sufficient lateral support. The wall bracings were inadequate to provide support for the walls; further, the masonry blocks on the walls had separated, leaving the wall subject to further deterioration. Additionally, the property was strewn with debris, including used vehicle tires, household furniture and flammable liquids. Thus, it was a prime candidate for a second fire. Pet.App.D; AA 1/98, ¶c.

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[3] See, "REASONS FOR DENYING THE WRIT", Part II, *infra*.

4. The structural engineer who accompanied city staff on the inspection recommended that the remaining walls be demolished or braced immediately. He opined that a moderate earthquake or strong wind could force the walls to collapse. This could cause heavy property damage or loss of life due to the proximity of the adjacent residential buildings and public rights-of-way. Further, the engineer recommended that if the walls were to be restored, the owner would have to submit complete plans and structural calculations to show all building components. Such plans would have to be certified, wet signed and stamped by a structural or civil engineer registered by the State of California. Further, the owner would have to test the block walls and reinforcements for fire damage, because the reinforcing bars, once exposed to heat, could fail. The test would have to include a test for seismic damage. Pet.App.D; AA 1/98-99, ¶d.

5. The Fire Department found that the building was structurally unsound and constituted a fire hazard because of the combustible debris located on the property. The Fire Department further found that the property was wired by temporary extension cords rather than permanent wiring. Pet.App.D; AA 1/99, ¶e.

6. The Health Department found that the toilet facilities on the premises were damaged and in need of repair to protect against waste water leakage. Pet.App.D; AA 1/99, ¶f.

Thus, for more than eleven months following the fire, petitioners allowed substantial hazards to public safety to exist on their property.

Resolution 5009 also directed either that petitioners abate the nuisance conditions by taking certain specified actions within specific time periods, or that, if petitioners failed to do so, City staff abate the nuisance by clearing the property and demolishing the structural ruins. Pet.App.D; AA 1/100-101. *The option was entirely petitioners'*. Resolution 5009 allowed petitioners to rebuild,

provided all tires, rims and debris were cleared from the property, proper plans were submitted, hazards abated, and construction commenced within the specifications and time limits of the Resolution. *Id.*

Petitioners never challenged Resolution 5009 or its findings by a Petition for Writ of Mandamus. Petitioners never challenged the remedial measures called for in Resolution 5009, or the time limits for completing those measures, by a Petition for Writ of Mandamus.

Instead, petitioners made half-hearted efforts to do less than the Resolution required, while ignoring any obligation to comply with those provisions with which they disagreed. When petitioners failed to comply in a timely fashion, and their failure continued for over two months, the City took the only course reasonably available: it applied to the Court for a warrant to abate the nuisance conditions itself. Pet.App. 5-6; AA 3/779-780. Even then, the City Prosecutor and the Court offered petitioners *more* time with which to comply with the simplest of the City's requirements: removal and storage of personal property, old tires and debris prefatory to petitioners' rebuilding. *Id.*; AA 3/784-793. Instead of accepting the Court's offer of additional time to effectuate the remediation, instead of requesting even more time than the extensions being offered were that necessary, and disregarding even their own lawyer's advice, petitioners elected their own fate:

> "THE COURT: Okay. Mr. Robertson, just listen carefully.
>
> * * *
>
> "THE COURT: I can get into that. But, Mr. Robertson, did you hear and understand and is that time frame and the conditions, are they agreeable with you, sir?
>
> "MR. ROBERTSON: Well, I hear it. I understand it. But whether I can comply with it or not is something –

"THE COURT: Well, we are going to give you a relief valve if you have bad weather or some misfortune that can't be avoided. But aside from that, will you make a good-faith effort to abide by the terms and conditions?

"MR. ROBERTSON: Well, I hear them. I understand them. But, as Gene [Beckman, the Robertsons' attorney] knows, I have a boss that tells me, that small voice, I guess you could say, and that's all I go by.

"THE COURT: Well, I mean, if you are telling me that you don't want to abide by these terms and conditions – What you are saying is that you are not going to abide by these terms and conditions. Then I am going to issue the order now.

"MR. ROBERTSON: Well, things come to me slowly. I have to – I rely on daily prayer and that's where I am right now.

* * *

"THE COURT: . . . So in that regard, with that correction, Mr. Robertson, do you understand the essence of what we are speaking?

"MR. ROBERTSON: I think I do. If you look, I don't think you will find a tire business in the City of South Gate that doesn't have outside storage.

"THE COURT: Well, I am not concerned with that type of discussion. At this point, Mr. Robertson, the question is: Do you feel you can live with the agreement that you are making in here? Because the alternative, sir, is if you tell me you feel you cannot or you have some other source giving you information or advice, I will sign the order tomorrow morning.

"MR. ROBERTSON: The order to bulldoze me down, sir?

"THE COURT: That's right, sir. The people have – the City of South Gate have sufficiently shown a concern for fire and safety and, I guess, the time has come to fish or cut bait.

"MR. ROBERTSON: Yeah.

"THE COURT: I am still willing to work with you. In fact, this is at my insistence that these time frames be put in here instead of just issuing the order today.

* * *

"THE COURT: Well, sir, it is not up to me to go over your plans. My concern is that the City of South Gate has followed the law, has a resolution – a hearing and a resolution was issued, in effect, requiring that the property be bulldozed. And it was my discussion with counsel to give you an opportunity to do things in a little timely fashion, give you some opportunity to do things in a more business-like way to protect your business, too, to see that you come back in, you know, and flourish.

"Now you want to put the Court in a hard spot. The Court does, you know, makes orders all day long. I put people in jail, but that is not – I don't get any pleasure out of it, but that is my job. My job right now is to follow the law.

"MR. ROBERTSON: Well –

"THE COURT: You have that obligation, too, sir.

"MR. ROBERTSON: Can you – I cannot say that I have done anything outside of the law. I proved to the city council that I was not 50-percent burnt, but that did not matter to them at all. At that time, if I am not 50-percent gone, I was supposed to have been able to rebuild.

> "THE COURT: Well, I am not going to rehear the City's matter. They made that determination, sir. If it is not me, it is somebody else that is going to make this order.
>
> "MR. BECKMAN [Petitioners' then attorney]: Your Honor, may I? [addressing his client, appellant Dale Robertson] The removal of the tires and the other personal property is for the purposes of reconstructing the building and to clean up the property at that time. I don't think the issue of outside storage is a proper one for this nor is it definitive for your purposes after the building is reconstructed. That is a different battle which you might have to fight with the City of South Gate, but it is to clear off the premises for construction purposes.
>
> "MR. ROBERTSON: Do what you will, but it will take the bulldozer to move the tires."

AA 3/787-792 (Transcript of Municipal Court Hearing on Abatement Warrant, Appendix J, App. 7-12).

The Municipal Court issued the abatement warrant directing the City to abate the nuisance, and the City proceeded to do so. Pet.App. 5-6. On November 14, 1991, when the City's contractor arrived at the site to continue the abatement, their access to the subject property was barred by appellant Dale Robertson. *Id.*; RT 4/751-752. Mr. Robertson refused to move out of the way of the contractor's bulldozer, despite repeated requests that he do so. *Id.* Mr. Robertson had been told that he had no right to be on the property by virtue of the City's Order to Vacate, posted when the City determined the property to be a nuisance. *Id.*; Pet.App.5, 6, 21. Mr. Robertson was aware of the Order to Vacate, because he had been cited several times for violating it. *Id.* The City had permitted Mr. Robertson to enter the property for the purpose of abating the nuisance, but Mr. Robertson testified that abating the nuisance was not his purpose on November

14, 1996. When Mr. Robertson continued to refuse to leave, he was arrested. *Id.*; RT 4/864-865.

The next day, the Penal Code § 148 charges against Mr. Robertson were dismissed under Penal Code § 991, because the Municipal Court Abatement Warrant had expired the day before Mr. Robertson was arrested. AA 3/796-808. No one alerted the Court at that time of the Order to Vacate and Mr. Robertson's violation of that order. *Id.*

II. PROCEDURAL HISTORY

Petitioners brought this action against defendants City of South Gate ("City"), its City Council, and certain City employees (collectively, the "City") for alleged damages resulting from the City's determination that petitioners' fire-gutted property constituted a nuisance which warranted abatement. On January 20, 1993, the trial court granted the City's motion to strike allegations of petitioners' First Amended Complaint ("first motion to strike"). Pet.App. E, 33-34; AA 1/182-185. The allegations stricken were those which challenged Resolution 5009, its findings, its orders or the process from which that resolution resulted. *Id.*; AA 1/77-79. The trial court ruled that petitioners' failure to challenge the City's quasi-adjudicative determination under C.C.P. Section 1094.5 rendered the decision, and the process by which the City reached its nuisance determination, *res judicata* and immune from collateral attack. *Id.*; AA 1/182-185.

In granting the City's first motion to strike, the trial court granted petitioners leave to amend. *Id.* Instead of amending the complaint to attempt to plead a mandamus cause of action, however, petitioners served the City with a Second Amended Complaint that merely re-alleged stricken allegations verbatim. Pet.App. F; AA 1/187-233. In other instances, petitioners added some verbiage to make old allegations look new or simply redrafted other

stricken allegations. *Id.* The City therefore filed a second motion to strike ("second motion to strike"). *Id.*; AA 1/247-280. When petitioners did not attend the hearing, the motion was granted. *Id.*; AA 2/338.

Thereafter, the City filed a motion for summary adjudication of petitioners' inverse condemnation causes of action and petitioners' declaratory relief causes of action which were cumulative of the inverse condemnation claims ("first summary adjudication motion"). AA 2/435, *et seq.* The City filed a second motion for summary adjudication as to petitioners' remaining claims against the City defendants: trespass, conversion and false imprisonment ("second summary adjudication motion"). AA 3/710, *et seq.* The trial court heard both motions on January 6, 1994. The trial court granted the first summary adjudication motion, on the ground that petitioners' failure to challenge the City's action declaring a nuisance and ordering abatement in mandamus rendered the City's actions *res judicata* and immune from liability for damages in inverse condemnation. Pet.App.G; AA 4/1052-1053 (motion granted for reasons stated in 1/20/93 minute order); Pet.App.E (1/20/93 minute order). The trial court had provided a "tentative" ruling on the second summary adjudication motion indicating its inclination to grant it as to the trespass and conversion causes of action, but deny it as to the false arrest claim. After petitioners expressly declared that they had no objections to the trial court's tentative ruling on the second summary adjudication motion (RT 1/57-58), the court granted the second summary adjudication motion as to the trespass and conversion causes of action, but denied it as to the false imprisonment cause of action asserted by appellant Dale Robertson. Pet.App.G; Pet.App.A, 18; AA 4/1053-1054. Following those motions, the only claims remaining to be tried as against the City were appellant Dale Robertson's claims of false arrest.

Appellant Dale Robertson's false arrest claims were tried to a jury, which returned a verdict for the City.

Petitioners appealed the judgment against them to the California Court of Appeal, Second Appellate District. Following briefing and argument, the Court of Appeal issued an unpublished opinion[4] affirming the judgment in full (Pet App. A). The California Supreme Court denied petitioners' Petition for Review. Pet.App.C.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FEDERAL QUESTION RIPE FOR REVIEW: PETITIONERS FAILED TO EXHAUST AVAILABLE STATE COURT COMPENSATION MECHANISMS

Petitioners' Fifth Amendment claim for just compensation is not ripe for review, because petitioners failed to seek compensation through the procedures the State of California provided for doing so. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Honorable Court held:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. [footnote omitted] The Fifth Amendment does not proscribe the taking of

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[4] Pursuant to California Rules of Court, Rule 976, decisions of the California Courts of Appeal are not published in the Official Reports unless a majority of the court rendering the opinion find that the opinions meets certain specified criteria. In this case, the Opinion below shows that it was not published in the Official Reports. Pursuant to Rule 977 of the California Rules of Court, an unpublished opinion may not be cited as precedent or relied on by any court or by any party in any other action. Rules 976 and 977 are reproduced as Appendix I.

> property; it proscribes taking without just compensation. [citation omitted] Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.' "

473 U.S. at 194.

This aspect of the ripeness doctrine applies regardless of whether the alleged taking is characterized as "regulatory" or "physical," for the policy is the same: until the property owner utilizes the procedures prescribed by the State and been denied compensation, no Fifth Amendment violation has occurred. *See, Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402-1403 (9th Cir. 1989), *cert. den.*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). In *Sinaloa*, the Ninth Circuit held that California's inverse condemnation remedies satisfy the *Williamson* standard and that failure to utilize California's remedies is a bar to federal court relief under the Fifth Amendment. *Id.*

As the Opinion of the California Court of Appeal in this case reveals, petitioners failed to utilize the available California procedures for seeking compensation, because they did not pursue a petition for writ of mandamus. The Courts below followed a long line of California cases which made it plain that such a mandamus petition was part and parcel of an inverse condemnation claim in California. The requirement that they pursue mandamus was made known to petitioners from the outset of this case, when the City filed its Motion to Strike allegations of the complaint. In granting the City's motion, the trial court expressly held that petitioners were required to pursue administrative mandamus as part of their quest for compensation, and granted petitioners leave to amend their pleading. For reasons unknown, petitioners failed to

take that opportunity to plead for mandamus relief in their amended complaint.

Petitioners argued before the California courts that the established procedure calling for a petition for writ of mandamus only applies in cases of alleged "regulatory takings" and that petitioners were alleging a "physical" taking.[5] The correctness of petitioners' view that California law requires a mandamus proceeding only in "regulatory" takings cases is not an appropriate issue for this honorable Court. The California courts are in the best position to judge what California procedures were available to petitioners and/or were required to be pursued. The several California courts that visited the question in this case determined that petitioners had not availed themselves of the procedures which California provided for doing so. Accordingly, this Honorable Court should decline certiorari on the simple ground that petitioners have failed to present a federal claim that is ripe for review.

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[5] In fact, as shown in Part III, *infra*, the City's actions in conducting a public hearing, finding that a nuisance exists, directing abatement of the nuisance and ordaining that the City would abate the nuisance if petitioners failed to do so in a timely fashion are best characterized as regulatory acts. Otherwise, virtually every instance of municipal regulation could be converted to a "physical" taking merely by a land owner's refusal to comply with the regulation and forcing the government to compel compliance by physical means.

II. THE CALIFORNIA COURTS PROPERLY HELD THAT PETITIONERS WERE BARRED BY THE DOCTRINE OF RES JUDICATA (PRECLUSION) FROM ASSERTING THEIR CLAIMS FOR COMPENSATION BECAUSE PETITIONERS FAILED TO CHALLENGE THE CITY'S DECISIONS BY A PETITION FOR WRIT OF MANDAMUS

The California courts applied a long line of California cases which require that to pursue an inverse condemnation action predicated on adoption or enforcement of a quasi-adjudicative decision (such as that embodied in Resolution 5009) land owners must challenge the decision by a writ of administrative mandamus. *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994); *California Coastal Comm. v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 1496 (1989); *Rossco Holdings Inc. v. State*, 212 Cal.App.3d 642, 661 (1989); *Patrick Media Group, Inc. v. California Coastal Comm. (PMG)*, 9 Cal.App.4th 592, 606 (1992); *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 (1992). Those cases, and cases preceeding them, all hold that a failure to challenge a quasi-adjudicative decision by a petition for writ of mandamus bars a claim for damages or compensation for inverse condemnation or violation of civil rights arising out of the decision. The courts below applied that rule in determining that petitioners were barred from pursuing their claims herein.

The South Gate City Council conducted a public hearing and determined that the burned-out structure and debris on petitioners' property was a hazard to public health and safety and a nuisance. The City Council therefore adopted Resolution 5009 in August of 1992, determining that a nuisance exists and setting forth a schedule for abating the nuisance. Petitioners' damages claims are thus barred by the preclusive collateral estoppel aspect of *res judicata*. *Rossco, Ham, Swartzendruber* and *PMG, supra*; *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986).

Ham, *Rossco*, and *PMG* involved collateral actions for damages based upon quasi-adjudicative administrative decisions. *Ham*, 210 Cal.App.3d at 1496; *Rossco*, 212 Cal.App.3d at 660-61; *PMG*, 9 Cal.App.4th at 607. In *Ham*, the Coastal Commission approved the demolition and rebuilding of a beach-front residence on the condition that the owner dedicate an easement for public access. 210 Cal.App.3d at 1492. In *Rossco*, property owners alleged that the Coastal Commission imposed unreasonable conditions on development of the land. 212 Cal.App.3d at 648. In *PMG*, the Coastal Commission conditioned a hotel construction permit on the removal of billboards from the property. 9 Cal.App.4th at 599. In each case, the failure to obtain judicial review of the agency's discretionary action by administrative mandate rendered it *res judicata* and immune from collateral attack. *Ham*, 210 Cal.App.3d at 1493; *Rossco*, 212 Cal.App.3d at 657; *PMG*, 9 Cal.App.4th at 608.

Moreover, the rule expressly extends to bar petitioners' claims to compensation under the Fifth Amendment. In *University of Tennessee v. Elliott, supra*, 478 U.S. 788, 92 L.Ed. 635, this honorable Court held that state law principles of *res judicata* are applicable in federal constitutional cases where state law so provides. Quoting from a previous decision of the Court, the Court in *Elliott* observed:

> "When an administrative agency is acting in a quasi judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 478 U.S. at 797-98, 92 L.Ed.2d at 645-46.

It is undisputed that the South Gate City Council was acting in a quasi-judicial capacity when it adopted Resolution 5009 finding petitioners' property to be a nuisance.

Under such circumstances, this honorable Court concluded in *Elliott*:

> "Accordingly, we hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' . . . *federal courts must give the agency's factfinding* the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799, 92 L.Ed.2d at 646-47 (citation, footnote omitted; emphasis added).

The holdings of the state courts below that petitioners' claims were barred under California principles of *res judicata* is in accord with – indeed directed by – the *Elliott* decision.

Both federal and California courts have relied on *Elliott* to bar federal claims similar to petitioners' on *res judicata* grounds. Following *Elliott*, the Ninth Circuit has held that the California rule expressed in the *Ham* and *Rossco* decisions and their progeny serves to bar federal civil rights claims in federal courts. *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. Cal. 1994), *cert. den.*, ___ U.S. ___, 115 S.Ct. 2613, 132 L.Ed.2d 856 (1995). In *Miller*, the District Court granted summary judgment for the defendant on plaintiff's Section 1983 action on the ground that the plaintiff's failure to challenge a Civil Service Commission decision by a petition for administrative mandamus pursuant to California Code of Civil Procedure Section 1094.5 rendered the administrative decision final, binding, *res judicata* and immune from collateral attack. 39 F.3d at 1031-1032. The Ninth Circuit affirmed the summary judgment, holding that the plaintiff's civil rights case was barred under the doctrines of *res judicata* and collateral estoppel under California law. 39 F.3d at 1032.

Moreover, the Ninth Circuit in *Miller*, also stated that it had previously held that California had already incorporated the *Utah Construction* standard reaffirmed in *Elliott*, so the only remaining question was "whether the administrative hearing met the requirements of California law such that a California court would have accorded the determination preclusive effect." 39 F.3d at 1033.

The California Court of Appeal followed *Elliott*, *Miller*, *Swartzendruber*, and earlier California cases in a case directly involving a local governmental land use decision in *Briggs v. City of Rolling Hills Estates*, 40 Cal.App.4th 637 (1995). In short, the California courts properly invoked California preclusion rules and determined that petitioners' claims were barred. Indeed, the courts below were instructed to do so by the holding of this honorable Court in *Elliott*. This Court should not engage in a needless exercise in reviewing California's preclusion rules; the Ninth Circuit has already determined that the applicable California rules pass federal muster in *Miller*, in which this Court denied certiorari and which has never been questioned or contradicted by other authority.

A. The California Courts Were the Proper Forum For Determining the Limits of California's *Res Judicata* Rules; Petitioners' Present Claim That The Decision Below Was Wrong Because Petitioners Complain of City Actions After Adoption of Resolution 5009 Was Adequately Disposed of By the California Courts

In claiming that they are not challenging Resolution 5009 itself but the manner in which it was enforced and applied by the City, petitioners merely repeat an argument they made to the California courts. The California courts rejected the argument, holding that the California rule of preclusion bars their claims for damages predicated on the City's nuisance abatement activities.

The California courts are unquestionably in the best position to determine the extent of their own preclusion rules, and the decisions below were unquestionably correct. *See, Takahashi v. Board of Education*, 202 Cal.App.3d 1464, 1474, *et seq.* (1988). In *Takahashi*, the court explained that "California courts employ the 'primary rights' theory", in which " 'the significant factor is the harm suffered.' " *Id.* at 1474. Thus, a prior adjudication that an employee's termination was for cause barred her subsequent suits for common law wrongful discharge, violation of federal civil rights acts for discrimination in employment on the basis of race or gender, and intentional infliction of emotional distress, since the harm suffered, and hence the "primary right" alleged, was plaintiff's termination from employment. *Id.* at 1475-1476. Likewise, the harm allegedly suffered herein, and hence the "primary right" involved, was the demolition of petitioners' fire-decimated structure to abate the public nuisance. The only "harm" petitioners' have ever alleged to have suffered was that property loss. Regardless of the theory of recovery they allege, petitioners' claims involve the same primary right and are barred and precluded by the doctrine of *res judicata*. And, *Elliott* required that the lower courts follow California's rules of *res judicata*/preclusion with respect to petitioners' federal claims.

The court below correctly concluded that California law precluded petitioners' claims, even in the face of petitioners' argument that they were not challenging Resolution 5009 itself.[6] In the California Supreme Court case of *Hensler, supra*, Hensler argued, as do petitioners here, that he was not challenging the validity of the city's action. Instead, Hensler sought damages on the ground

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[6] An argument which the California Court of Appeal found to be factually not supported by the record. Pet. App. A, App. 13, n. 1.

that the ordinance effected a taking of his property. Hensler argued that as a matter of federal constitutional right, an action in inverse condemnation seeking damages for a permanent taking may be initiated without a challenge to the application of the ordinance to the affected property. *Hensler*, 8 Cal.4th at 9. Here, similarly, petitioners argue that an action to recover damages for abatement of a nuisance can be initiated without a challenge to the nuisance determination which authorized the abatement. The California Supreme Court soundly rejected Hensler's argument:

> "A California landowner who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. *If he does so, the state may deem the owner to have waived the 'taking' claim.*"

Hensler, supra, 8 Cal.4th at 19 (emphasis added).

The *Hensler* court concluded:

> "We therefore reject . . . [Hensler's] argument that he need not pursue administrative and judicial remedies as a prerequisite to a suit in inverse condemnation."

Hensler, 8 Cal.4th at 13. The California Supreme Court's statement disposes of petitioners' argument to the contrary, *i.e.*, that they are not challenging the City's nuisance determination and abatement order and therefore need not have obtained mandamus review of the City's decision.

Moreover, petitioners' claim that they are not contesting the findings and conclusions of Resolution 5009 but merely the manner in which it was applied and enforced necessarily assumes that they were willing to comply with the resolution. Petitioners argue that certiorari should be granted to determine whether a property owner can be required to pursue mandamus when the

property owner is not challenging the terms of the ordinance itself. Petitioners claim that they "are challenging the manner in which the City implemented Resolution 5009 and contending the City thwarted their efforts to comply with the resolution." Petition, p. 25.

In making that argument, petitioners appear to confuse the federal law principles involved in determining whether an inverse condemnation claim under the Fifth Amendment is ripe under *Williamson Planning Commission, supra,* with state law rules of preclusion. Indeed, petitioners cite *Williamson Planning Commission* and cases dealing with the ripeness doctrine. But whether the state has a "reasonable, certain and adequate provision for obtaining compensation" is simply not relevant to the *res judicata* holdings of the lower courts. As noted in Part IIB, *infra,* ripeness was never an issue in the courts below, because the lower courts held that petitioners were barred from pursuing this action on any grounds under the California preclusion rules. Thus, petitioners' second question presented asks the Court to decide an issue which would go to a possible defense to their claim (ripeness), when that defense was not a basis for deciding in the City's favor.

Moreover, the California courts properly rejected petitioners' argument that they are not challenging the Resolution but merely its application because the argument is demonstrably and factually false from the record. If petitioners are not challenging Resolution 5009 or the requirements imposed by the resolution, then they had absolutely no basis for refusing to comply. Petitioners cannot claim with a straight face that their efforts to comply with the abatement order were "thwarted," when petitioner Dale Robertson stood before the Municipal Court and declared that he would not comply with the order, and double-dog dared the City and the Court to bring on the bulldozer. As the lower courts correctly found, petitioners failed to comply with any aspect of

Resolution 5009 in a timely fashion. And, they openly declared that they would rely on prayer rather than court order to guide their actions. All of their rhetoric about being "thwarted" in their efforts to comply and about their beef with City actions occurring after adoption of Resolution 5009, therefore, is a smokescreen.

B. The Rule Applied By the California Courts and The Decision Below Do Not Conflict With Other Decisions

Petitioners' contention that the decisions below conflict with the Sixth Circuit's decision in *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694 (6th Cir. 1996), *cert. den.*, ___ U.S. ___, 117 S.Ct. 71, 136 L.Ed.2d 31 (1996) is wrong for several reasons.

First, the *Kruse* decision dealt with the issue of whether the State of Ohio had a "reasonable, certain and adequate provision for obtaining compensation" for purposes of determining ripeness under *Williamson Planning Commission v. Hamilton Bank, supra*. As discussed in greater detail in Part I, *supra*, the ripeness doctrine generally requires that property owners exhaust available state law compensation procedures before the federal courts will entertain a claim for compensation under the Fifth Amendment. Ripeness was never an issue in the California courts in this case, however. Thus, the unpublished decisions below cannot conflict with *Kruse* because the issue decided in *Kruse* simply was not litigated below.

Second, the *Kruse* case is distinguishable on several key factors. The Court in *Kruse* concluded that the plaintiffs therein had satisfied the ripeness doctrine due to a variety of factors. In *Kruse*, the Sixth Circuit observed that while Ohio's Appropriations statutes defined the procedures for the government's exercise of eminent domain powers and payment of just compensation, the statutes did not include a provision for owners to initiate inverse

condemnation cases. In *Kruse*, only a single Ohio Supreme Court case decided *after* the actions which constituted a taking in *Kruse* allowed a property owner to seek a writ of mandate to compel the government to initiate appropriations proceedings. 74 F.3d at 698-699. In the present case, California law has several statutes expressly relating to inverse condemnation cases[7], and California decisional authority clearly required mandamus challenges to quasi-judicial actions alleged to amount to takings for many years prior to the events alleged by petitioners. *See, Ham, supra; Rossco; supra.*

Moreover, the plaintiffs in *Kruse* had pursued state court remedies which resulted in a judgment in their favor, but which did not include monetary compensation. Thus, the City in *Kruse* had admitted that it had "taken" the plaintiffs' property and had not paid compensation for it. Here, of course, petitioners have not prevailed at any stage of the proceedings and, far from being an admitted fact, the question of whether there was a compensable taking has not been adjudicated because petitioners steadfastly refused numerous opportunities to present their case properly.

In addition, finally, the decision below is not published in any event, so there can be no concern about conflicting precedents. Petitioners' claim that the decision below somehow conflicts with *Kruse* is simply untenable.

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[7] *See*, e.g., California Code of Civil Procedure Section 1036 (providing for awards of costs, litigation expenses and attorneys' fees to prevailing plaintiffs in inverse condemnation cases); California Government Code Section 905.1 (exempting inverse condemnation actions from the claims filing requirements of California's Tort Claims Act).

III. PETITIONERS' COMPLAINT THAT THE CITY'S CONTRACTOR WENT BEYOND THE SCOPE OF THE NUISANCE ABATEMENT ORDER WAS ADEQUATELY DISPOSED OF BY THE CALIFORNIA COURTS

Petitioners ask this honorable Court to grant certiorari to decide whether actions by the City's independent contractor which allegedly went beyond the scope of the nuisance abatement order and warrant were "regulatory" takings or "physical" takings. Again, however, the California courts were best suited to determine how California rules of preclusion applied to the facts of this case.

Indeed, to the extent California courts have characterized the requirement that a petition for mandamus be pursued as applicable only in regulatory takings cases, the distinction between regulatory and physical takings for that purpose is purely an issue of California preclusion law, and does not present any federal question. True, the "regulatory takings" and "physical takings" labels have been employed by the federal courts, including this honorable Court, for purposes of determining whether a compensable taking has occurred. *E.g., Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

However, to the extent those labels are employed by the California courts in determining the scope of the California preclusion rules, their meaning in that context are matters of state preclusion law for the state court to resolve. The important fact is that the California courts held that *res judicata* barred petitioners' claims, not what labels may have been employed in the analysis.

Furthermore, the City's actions in this case were clearly regulatory under any analysis. According to petitioners, since their refusal to comply with the City's regulatory decision forced the City ultimately to resort to physical means to compel compliance, they were not required to pursue their mandamus remedies to challenge the City's decision.

By petitioners' reasoning, the fundamental purpose of the rule requiring a mandamus challenge could be defeated in every case simply by obstinate defiance. Ultimately, in every case of land use regulation, the only viable method of enforcement in the face of a recalcitrant land owner is by physical means. The important public policies which underlie the rule would be eviscerated if landowners were allowed to gain an advantage by such recalcitrance by being relieved of the mandamus requirement. Those important policies were in part articulated by the California Supreme Court in *Hensler, supra*:

> "The purpose of statutes and rules which require that attacks on land use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions, and actions which challenge the validity of land use statutes, regulations, and/or decisions, is to permit and promote sound fiscal planning by state and local governmental entities. As the Court of Appeal explained in *Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 612: 'The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required. If no such early opportunity were given, and instead, persons

> were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.' "

8 Cal.4th at 27-28.

Indeed, this Court has repeatedly held that it is the government's decision alone whether to exercise the power of eminent domain and pay compensation; landowners may not force the government to exercise its eminent domain powers:

> "Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function. . . . Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."

First English, supra, 482 U.S. at 319; *also see, Lucas, supra.*

Nevertheless, petitioners contend that since physical means were employed to enforce the City's regulatory action, they alleged a "physical taking," not a "regulatory taking." If petitioners' view were accepted, any landowner could force government to condemn property merely by, as petitioners did here, refusing to comply with regulations, and waiting until the government seeks to compel compliance therewith by its last resort: physical intervention.

This is not a case where a landowner ran out of time and could not find a way to comply with the City's abatement order in a timely fashion. Nor is this a case where a municipal government hastily and summarily abated a nuisance without regard to the landowner's interests. Rather, this is a case where petitioners simply

ignored the time requirements contained in the abatement resolution, and made no effort whatsoever to comply with (or challenge by a petition for writ of mandate) portions of that order. Moreover, both the City and the Municipal Court Judge offered to give petitioners even more time to commence remediation efforts, but petitioners made it clear that no amount of time would result in any change in position. Instead, petitioners unabashedly declared that it would take bulldozers to obtain compliance with the City's abatement resolution.

But that does not change the fact that the City merely exercised its authority to regulate land use. The City did not seek a physical solution to the nuisance; petitioners forced that remedy, and brought the result upon themselves, by failing and refusing either to abide by the regulation or challenge it in a Court of Law by a Petition for Writ of Mandamus. Both this High Court (*First English, supra,* 482 U.S. at 319) and the California courts, have repeatedly held that landowners may not unilaterally by their actions force agencies to condemn property:

> "A complaint in inverse condemnation, even one which does not expressly attack the validity of the ordinance or its application, and seeks only compensation for an alleged taking, must be deemed a challenge to the local action. This follows because the constitutional validity of the governmental action if uncompensated must be determined in the course of ruling on the claim that compensation is owed. Moreover, the validity of the action must be determined to afford the local entity the opportunity to rescind its action rather than pay compensation for a taking. *A landowner may not, by seeking only compensation, force a governmental agency to condemn the property.*"

Hensler, 8 Cal.4th at 7 (emphasis added).

> "[Hensler] seeks to do what the high [United States Supreme C]ourt says a landowner has no right to do – to force the city to exercise the power of eminent domain."

Hensler, 8 Cal.4th at 12.

Despite that principle, petitioners in the present case argue that they *do* have the right to "force the city to exercise the power of eminent domain" by defying the City's regulatory order without mounting any legal challenge, forcing the City to abate the nuisance, then seeking compensation for the physical invasion necessitated by petitioners' own recalcitrance. But, petitioners cannot convert the City's exercise of its regulatory power to a physical taking by their own stubbornness.

Finally, to the extent petitioners claim that the nuisance abatement order was exceeded, it was the independent contractor retained by the City that did the work. The City directed the contractor to carry out the terms of the abatement order and the contractor did so. If the contractor erred and went beyond the terms of the order, that does not constitute governmental action so as to trigger constitutional concerns.

Petitioners may have had viable remedies for these allegations in their state law tort claims of trespass and conversion. But petitioners allowed the contractor to escape liability by demurrer to the complaint. Petitioners failed even to appear at the demurrer hearing and failed to cure the pleading defect even though granted leave to amend the complaint. Pet. App. F, App. 36. Moreover, petitioners acquiesced in the trial Court's tentative ruling to grant the City's summary adjudication motion as to the trespass and conversion claims, and thereby waived any right to maintain those claims, as the Court of Appeal found. Pet. App. A, App. 18-19. Of course, any review of these issues by this Court would require this Court to engage in factual inquiries and examination of the evidentiary record and pleadings and review the factual

findings of the California trial and appellate courts in issues of State law. This Court should decline petitioners' invitation to do so.

CONCLUSION

The state courts below followed the precedents of this Court and applied California preclusions rules to petitioners' Fifth Amendment claims for compensation. In doing so, the lower courts correctly found and held that petitioners had failed to pursue a writ of administrative mandamus, which well-established California law required in order to pursue relief for an alleged taking. Granted leave to amend their complaint several times, petitioners failed to correct their error. Therefore, petitioners having failed to utilize the procedures for obtaining compensation which California law had provided, petitioners' claims under the Fifth Amendment of the United States Constitution are not ripe for adjudication. Moreover, petitioners' various *post hoc* rationalizations for their failure to pursue the available procedures for compensation were patently belied by the record below, and granting certiorari would require this court to re-examine the facts, evidence and findings of the lower courts. The unpublished Opinion of the California Court of Appeal does not create any conflict with the decisions of this Court or of the Circuit Courts of Appeals, and in fact follows the pertinent federal decisions. Petitioners have presented no important federal questions for review, and the Petition for Certiorari should be denied.

Dated: July 22, 1997

Respectfully submitted,

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RICHARDS, WATSON & GERSHON
A Professional Corporation

Attorney for Respondents
City of South Gate, California, et al.

APPENDIX I

Rule 976(b), California Rules of Court:

"No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

> "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> "(2) resolves or creates an apparent conflict in the law;
>
> "(3) involves a legal issue of continuing public interest; or
>
> "(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

Rule 976(c)(1), California Rules of Court:

"(1) An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b)."

Rule 977(a), California Rules of Court:

"(a) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other

action or proceeding except as provided in subdivision (b)."

Rule 977(b), California Rules of Court:

"(b) Such an opinion may be cited or relied on:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

"(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

APPENDIX J

IN THE MUNICIPAL COURT OF
SOUTHEAST/SOUTH JUDICIAL DISTRICT

COUNTY OF LOS ANGELES STATE OF CALIFORNIA

HON. FRANK GAFKOWSKI, JR., JUDGE — DIVISION III

IN THE MATTER OF THE APPLICATION OF THE CITY OF SOUTH GATE FOR A WARRANT TO DEMOLISH STRUCTURES AND ABATE NUISANCE AT THE PROPERTY LOCATED AT 5870 E. IMPERIAL HIGHWAY, SOUTH GATE, CALIFORNIA	)	MISC. NO. 1308

TRANSCRIPT OF PROCEEDINGS
October 30th, 1991

REPORTER'S TRANSCRIPT

APPEARANCES:

PROSECUTORS FOR THE CITY OF SOUTH GATE	STEVEN H. ROSENBLIT DAPEER & ROSENBLIT 2770 East Slauson Avenue Huntington Park, Ca 90255
For DALE ROBERTSON:	GENE W. BECKMAN Attorney at Law 374 East Avocado Crest Road La Habra Heights, Ca 90631
	CELIA BERNAL, C.S.R. #3959 OFFICIAL REPORTER

[p. 2] SOUTH GATE, CALIFORNIA, WEDNESDAY, OCTOBER 30th, 1991

THE COURT: The Court is on the record in the matter of the Application of the City of South Gate with respect to certain real property located at 5870 East Imperial Highway in the City of South Gate, State of California, Miscellaneous File No. 1308.

The Court has before it certain parties of interest in this matter: For the City of South Gate, Mr. Steven Rosenblit, who is by contract City Attorney in this matter; correct?

MR. ROSENBLIT: City Prosecutor, Your Honor.

THE COURT: City Prosecutor.

And we have the assistance of Mr. Cervantes.

MR. CERVANTES: Yes.

THE COURT: Encarnacion Cervantes, Director of Building.

To represent the interest of the property owner, Mr. Dale Robertson, is attorney Gene W. Beckman.

We are on the record. Now, as I understand there are certain terms and conditions which will be set forth as to a time frame; correct?

MR. ROSENBLIT: Yes, Your Honor.

Before I proceed, may I also have the record reflect that Mr. Robertson and perhaps his wife – she hasn't identified herself – are also present in the courtroom.

[p. 3] THE COURT: Yes. They are present.

Let me do this. I prepared a preamble to this matter to be of some assistance. And, if you then wish, Mr. Rosenblit, you can dictate what the terms and conditions are, just as such.

My order will be as follows. We will have this prepared and the Court will sign it and place it in the file at the conclusion of these proceedings. In other words, so you have something in writing if you wish to come back and look at it.

Anyway, we will start as follows:

The City of South Gate's application for a warrant to demolish structures and abate nuisances as ordered by its Resolution No. 5009 on August 26th, 1991, is approved by the Court – is approved by the Court and a warrant forthwith shall issue – pardon me – a warrant shall forthwith issue authorizing the City of South Gate to demolish the structures and abate the nuisances relating to the real property as described in Resolution 5009 and that respects the property at 5870 East Imperial Highway, South Gate, California. The execution of this warrant shall be stayed only on condition that certain acts are completed by the owners of said real property described in that Resolution 5009 in accordance with the following time schedule.

Failing any of the acts to be performed within the respective times as required, upon the ex parte affidavit of a responsible City official attesting to the [p. 4] same, the stay on this warrant shall be removed and this warrant may then be immediately executed.

Now, if you'd like to relate the terms and conditions.

MR. ROSENBLIT: Yes, Your Honor. I'd be glad to.

On or before November 14, 1991, at 3:00 p.m., the property owners must clear this property and remove the trailer and all other personal property including, without limitation, all tires, racks, rims and automobiles.

Further, the property owners must obtain City approval of the abatement of this nuisance in the condition of this property by November 14, 1991, at 3:00 p.m.

By December 2, 1991, at 4:00 p.m., the property owners must obtain a building permit from the City and start construction. Starting construction is defined as having building materials on site and filing a construction schedule with the Building Department of South Gate and having a contractor or job superintendent at the job site and working daily.

On or before February 2, 1991 [sic], construction is to be completed with City approval after final inspections.

THE COURT: Within that time, I presume.

In other words, final inspections and the construction completed prior to that date; correct?

MR. ROSENBLIT: Right. Prior to February 2, 1991.

Your Honor, I am not familiar if this was in your preamble or not. I don't recall.

[p. 5] THE COURT: About the three-day notice?

MR. ROSENBLIT: Yes.

THE COURT: I have something to follow, yes. So let's just see.

Mr. Robertson, did you hear the terms and conditions? Sir, if you'd like to step forward, you may.

MR. ROBERTSON: I heard part of it.

THE COURT: Okay. Mr. Robertson, just listen carefully.

Madam Reporter, just those terms and conditions, please.

(Record read.)

THE COURT: All right. Let's reword that last.

The construction is to be completed with City approval for final inspection having been obtained and filed by February 2nd, 1992, so that the inspection and approval or completion is within that frame, not to be open-ended.

MR. BECKMAN: Your Honor, to that point, in discussing delays, unavoidable delays, we have some language that was drafted, also, for us.

THE COURT: I can get into that.

But, Mr. Robertson, did you hear and understand and is that time frame and the conditions, are they agreeable with you, sir?

MR. ROBERTSON: Well, I hear it. I understand it. But whether I can comply with it or not is something –

THE COURT: Well, we are going to give you a relief valve if you have bad weather or some misfortune that can't [p. 6] be avoided. But aside from that, will you make a good-faith effort to abide by the terms and conditions?

MR. ROBERTSON: Well, I hear them. I understand them. But, as Gene knows, I have a boss that tells me, that small voice, I guess you could say, and that's all I go by.

THE COURT: Well, I mean, if you are telling me that you don't want to abide by these terms and conditions –

What you are saying is that you are not going to abide by these terms and conditions. Then I am going to issue the order now.

MR. ROBERTSON: Well, things come to me slowly. I have to – I rely on daily prayer and that's where I am right now.

THE COURT: Well, let me suggest this. Let's just take a moment.

Mr. Beckman, would you just explain to Mr. Robertson what I mean by a good-faith effort to comply.

Take a moment.

Let me explain, also, I will dictate this last term so that Mr. Robertson can keep that in mind, too.

The owners of said real property described in Resolution 5009 may make application to the Court for relief from the time requirements of this stay of execution, but

not any other performance requirements, upon three days' notice to the City of South Gate.

MR. ROSENBLIT: May I inquire, Your Honor?

THE COURT: Yes.

MR. ROSENBLIT: This process of application of [p. 7] three-day notice, wasn't that to apply only once construction has commenced? Because in your preamble you make reference to an affidavit in the event the first part of not clearing the property is not completed.

THE COURT: Well, the conditions upon which this order may be – the stay would be lifted are any of the things, as far as cleaning the property up, not beginning construction and so forth.

I think I have to give Mr. Robertson the opportunity also to have the possibility of a hardship with respect to cleaning the property up if the weather really turns bad or we have an earthquake or something. I understand the problems, but I have to give him that. But, obviously, the contingencies for cleaning the property would have to be very, very great to get any kind of relief. I think that would be fair.

Anyway, Mr. Beckman, take a moment, please.

(Brief recess.)

THE COURT: We are back on the record. Everyone is present.

I have just had a brief conversation with counsel in view of the remark I made at the end about the owner's seeking relief from some of the time restraints, not the

conditions, but the time of any of these conditions' performance. I think the City's concern is such that it is warranted that I limit that application for relief for time restraints only to the fact of the construction, not from things to be done prior thereto. This is the cleanup or the [p. 8] obtaining of permits or the start of construction.

I think when we were discussing matters in chambers, we were talking about the possibility of bad weather maybe hampering some of the construction work. That would be very well-taken to have a delay in the requirement.

So in that regard, with that correction, Mr. Robertson, do you understand the essence of what we are speaking?

MR. ROBERTSON: I think I do. If you look, I don't think you will find a tire business in the City of South Gate that doesn't have outside storage.

THE COURT: Well, I am not concerned with that type of discussion. At this point, Mr. Robertson, the question is: Do you feel you can live with the agreement that you are making in here? Because the alternative, sir, is if you tell me you feel you cannot or you have some other source giving you information or advice, I will sign the order tomorrow morning.

MR. ROBERTSON: The order to bulldoze me down, sir?

THE COURT: That's right, sir. The people have – the City of South Gate have sufficiently shown a concern for fire and safety and, I guess, the time has come to fish or cut bait.

MR. ROBERTSON: Yeah.

THE COURT: I am still willing to work with you. In fact, this is at my insistence that these time frames be put in here instead of just issuing the order today.

MR. ROBERTSON: Well, I owe the city of – the people [p. 9] in the City of South Gate to keep selling used tires. So if you say I cannot sell used tires anymore, then Imperial Tire is out of business and might as well be bulldozed. For 25 years you have not seen me in this courtroom. I have settled every little problem over tires, over service with the customer.

THE COURT: Well, Mr. Beckman, is that a no?

MR. ROBERTSON: All of a sudden I am a bad guy.

MR. BECKMAN: I am sorry.

THE COURT: Is that a no answer, that he can't make an agreement and live with it and do the best he can?

MR. ROBERTSON: I cannot remove – I can possibly screen the used tires so they are not seen. I wanted to put landscaping in there. I want to put a front brick wall on there.

THE COURT: Well, sir, it is not up to me to go over your plans. My concern is that the City of South Gate has followed the law, has a resolution – a hearing and a resolution was issued, in effect, requiring that the property be bulldozed. And it was my discussion with counsel to give you an opportunity to do things in a little timely fashion, give you some opportunity to do things in a more business-like way to protect your business, too, to see that you come back in, you know, and flourish.

Now you want to put the Court in a hard spot. The Court does, you know, makes orders all day long. I put people in jail, but that is not – I don't get any pleasure out of it, but that is my job. My job right now is to [p. 10] follow the law.

MR. ROBERTSON: Well –

THE COURT: You have that obligation, too, sir.

MR. ROBERTSON: Can you – I cannot say that I have done anything outside of the law. I proved to the city council that I was not 50-percent burnt, but that did not matter to them at all. At that time, if I am not 50-percent gone, I was supposed to have been able to rebuild.

THE COURT: Well, I am not going to rehear the City's matter. They made that determination, sir. If it is not me, it is somebody else that is going to make this order.

MR. BECKMAN: Your Honor, may I?

The removal of the tires and the other personal property is for the purposes of reconstructing the building and to clean up the property at that time. I don't think the issue of outside storage is a proper one for this nor is it definitive for your purposes after the building is reconstructed. That is a different battle which you might have to fight with the City of South Gate, but it is to clear off the premises for construction purposes.

MR. ROBERTSON: Do what you will, but it will take the bulldozer to move the tires.

MR. BECKMAN: Your Honor, I have nothing else.

MR. ROSENBLIT: Your Honor, I would propose the abatement warrant in view of the defendant's comment. May I lodge it with the Court?

THE COURT: Let me see it. If it is an order, I will sign it.

[p. 11] All right. The Court signs the warrant.

MR. ROSENBLIT: Thank you, Your Honor.

MR. BECKMAN: Thank you, Your Honor.

CERTIFICATE

STATE OF CALIFORNIA)
: ss
COUNTY OF LOS ANGELES)

I, CELIA BERNAL, C.S.R. #3959, do hereby certify:

That the foregoing is a full, true, and correct transcript of the testimony given and proceedings had in the aforementioned action taken on the aforementioned date;

That it is a full, true, and correct transcript of the evidence offered and received, instructions, acts, and statements of the Court, also all objections and exceptions of counsel, and all matters to which the same relate;

That I reported the same in stenotype, being the duly appointed, qualified, and acting Certified Shorthand

Reporter of said court, and thereafter had the same transcribed into typewriting as herein appears.

Dated this 31st day of October 1991.

/s/ Celia Bernal
CERTIFIED SHORTHAND
REPORTER